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No. 727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

STANKER AND GALETTO, INC., a corporation of New Jersey, and LEON STANKER and PETER GALETTO, Individually,

Petitioners,

vs.

EARTH MOVERS, INC., a corporation of Delaware,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX

PAGE

Questions Presented 2

Statement of the Case 3

Argument 5

I. The Decision Below Is Clearly Correct 5

II. The Judgment Below Is Not Final 10

III. There Is No Important Question of Federal Law 11

Conclusion 12

CITATIONS

CASES:

Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U. S. 251 11

Hanson v. Denckla, 357 U. S. 235 ..... 8, 10, 12

International Shoe Co. v. Washington, 326 U. S. 310 ... 6, 7, 8, 12

McGee v. International Life Ins. Co., 355 U. S. 220 .. 6, 7, 8, 11, 12

RULES:

The Revision of the Rules Governing the Courts of the State of New Jersey, R. R. 4:4-4(d) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION.

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QUESTIONS PRESENTED

1. Whether the respondent had a substantial minimum contact with the State of New Jersey so as to allow a New Jersey Court to exercise *in personam* jurisdiction through service of process by registered mail pursuant to The Revision of the Rules Governing the Courts of the State of New Jersey, R. R. 4:4-4(d)?

2. Whether convenience and practicality are the determining factors in establishing a state court's *in personam* jurisdiction of a foreign corporation where service of process has been by registered mail?

STATEMENT OF THE CASE

In 1960 U. S. Plywood Corp. desiring to erect a warehouse on Route 13A south of Seaford, Delaware, entered into a contract with the firm of Hastings and Eskridge, general contractors, for the construction of that building. Hastings and Eskridge thereafter entered into a verbal contract with the respondent Earth Movers, Inc., a Corporation of the State of Delaware with offices in Seaford, Delaware, for grading, blacktopping, and similar work in the construction of that building. Soon thereafter Mr. Hastings died and all work on the project was suspended and Earth Movers, Inc. was paid for work done by it to that date. Thereafter, one Mr. Peter Galetto of the firm of Stanker and Galetto, Inc. went to the offices of Earth Movers, Inc. in Seaford, Delaware, and informed Mr. Louis H. Callaway, President of that firm that Stanker and Galetto had contracted to complete the building project for U. S. Plywood Corp. and solicited the service of Earth Movers, Inc. Discussion was had at that time as to the terms of the verbal contract theretofore entered into between Earth Movers, Inc. and Hastings and Eskridge, certain portions of which were eliminated by Mr. Galetto and a price agreed upon. In order to formalize the agreement, a written proposal was prepared by Earth Movers, Inc. (Petitioner's Appendix Below, p. 36a) and as the affidavit of Mr. Peter Galetto claims (Petitioner's Appendix Below, p. 30a), it was mailed to him in Vineland and formally accepted by him. Thereafter, the only interstate matter that occurred was the statement sent by Earth Movers, Inc. (Petitioner's Appendix Below, p. 39a) and the payments made by Stanker and Galetto, Inc. by checks mailed from New Jersey to Delaware (Petitioner's Appendix Below, p. 40a). The

above facts are established by the affidavit of Louis H. Callaway (Petitioner's Appendix Below, p. 25a).

On August 17, 1962, the plaintiff Webb commenced an action against petitioners, Stanker and Galetto, Inc., et als., and by an amended complaint (Petitioner's Appendix Below, p. 1a) alleged injuries and losses which Plaintiff claims he suffered when he fell while working as a painter on premises at Seaford, Delaware, in the course of the erection of the premises by petitioners as the prime contractors. On September 5, 1962, Stanker and Galetto, Inc., et als., filed an answer denying negligence (Petitioner's Appendix Below, p. 13a) and thereafter by leave of Court by order of March 11, 1963 (Petitioner's Appendix Below, p. 17a), instituted a third party action against Earth Movers, Inc. and others (Petitioner's Appendix Below, p. 18a) asserting a right to indemnification or at least to a proportionate participation as joint tortfeasors. U. S. Plywood Export Corp. and U. S. Plywood Corp. as the other Third Party Defendants were served with process of summons within the State of New Jersey and thereafter filed Answer joining issue. Earth Movers, Inc. was served by registered mail at Seaford, Delaware, with the return receipt, carrying the signature of an agent of this Delaware Corporation (Petitioner's Appendix Below, p. 23a). Earth Movers, Inc. thereafter moved by notice of motion and supporting affidavit returnable on June 28, 1963, to dismiss the service for lack of jurisdiction (Petitioner's Appendix Below, pp. 24a-25a). After presentation of oral argument and the affidavit of Peter Galetto for Stanker and Galetto, Inc., et als. (Petitioner's Appendix Below. p. 29a) and the affidavit of Louis H. Callaway for Earth Movers, Inc. (Petitioner's Appendix Below, p. 24a), the trial court, based on an oral opinion rendered on July 11, 1963 (Appendix E of Petition, p. 13a), entered an order dated July 26, 1963, dismissing service of process on the respondent (Ap-

pendix D of Petition, p. 12a). Motion for leave to appeal from the interlocutory order was made on August 26, 1963, and an order granting leave to appeal was granted on September 17, 1963 (Petitioner's Appendix Below, p. 46a). Thereafter, notice of appeal was filed (Petitioner's Appendix Below, p. 48a), briefs submitted, argument heard and by Opinion dated June 11, 1964 (Appendix C of Petition, p. 3a), the judgment of the trial court was affirmed, a Mandate on Affirmance being issued (Appendix B of Petition, p. 2a).

Notice of Petition for Certification, Petition for Certification and a brief in opposition to the petition were served and filed and on September 14, 1964, the Supreme Court of New Jersey denied certification (Appendix A of Petition, p. 1a).

ARGUMENT

I.

The Decision Below Is Clearly Correct

The petitioners' contention that the decision of the Court below was not in accord with the applicable decisions of this Court is based on four reasons stated in the petition. The reasons given are (1) that the Appellate Court erroneously took into consideration the absence of "activities" of the respondent in the State of New Jersey in determining whether the respondent had a sufficient minimal contact with the State of New Jersey so as to allow the state court to exercise in personam jurisdiction where service of process was by registered mail (Petition, p. 14); (2) that

the Appellate Court erroneously interpreted the opinion in *McGee v. International Life Ins. Co.*, 355 U. S. 220, by concluding that a persuasive factor in that case was that the contract sued upon was a contract of insurance (Petition, pp. 15, 20); (3) that the Appellate Court erroneously concluded that the petitioners' cause of action did not "arise out of" the contract between the petitioner and the respondent (Petition, p. 15), and (4) that convenience and practicality should have been deciding factors which properly considered in light of the facts, would have resulted in a reversal of the trial court's order by the Appellate Court (Petition, pp. 18, 21-22).

The petitioners play on words when they (Petition, p. 14) differentiate between ". . . 'activities' within the state of the forum, rather than 'minimal contacts' therein." It is submitted that the question of whether a foreign corporation has a sufficient minimal contact with a forum state is to be resolved in part by a consideration of the activities of that corporation in the forum state. That is a starting point. The recent decisions by this Court have demonstrated that where such activity may be slight, other factors involved in the particular case may create a situation in which service of process by registered mail would satisfy the purposes of due process. There is nothing "antiquated" about considering the activities of the foreign corporation within the forum as the petitioners have stated (Petition, p. 14). Contrary to the petitioners' assertion (Petition, p. 15), a consideration of such activities is as much the law today as it was prior to *McGee v. International Life Ins. Co.*, supra, and *International Shoe Co. v. Washington*, 326 U. S. 310. In *International Shoe Co. v. Washington*, finding the activities of the foreign corporation to be systematic and continuous rather than irregular and occasional, the Court stated (326 U. S. at p. 319):

> "But to the extent that a corporation exercises the privilege of conducting *activities* within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as these obligations arise out of or are connected with the *activities* within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances hardly be said to be undue." (Emphasis ours.)

In the *McGee* case, although the Court did not find the "systematic and continuous activity" of *International Shoe*, it did find that the one contract was a sufficient "minimal contact" under the circumstances, *viz.*, the cause of action was based directly upon a contract in which the state had a special interest, the Court stating (355 U. S. at p. 223):

> "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."

Although in the *McGee* case the activity of the foreign corporation had been only the solicitation and consummation of one contract in the forum state, such activity was thought by the Court to have created a sufficient minimal contact with the forum state. However, in reaching that decision, the slight activity of the foreign corporation was weighed with another compelling factor involved in that particular case. As the Court stated (355 U. S. at p. 223):

> "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."

That this factor was a compelling reason for the Court's determination was clearly shown by the Court six months

later in *Hanson v. Denckla*, 357 U. S. 235. At page 252 of that opinion, the Court stated:

> "This case is also different from McGee in that there the state had enacted special legislation (Unauthorized Insurers' Process Act) to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an *activity* that the state treats as exceptional and subjects to special regulation." (Emphasis ours.)

We note the fact that the petitioners have several times (Petition, pp. 15, 22) informed the Court that the respondent has insurance and have attempted in that manner to inferentially equate the facts of the instant case with those of the *McGee* case. We believe that the weakness of such an argument is obvious and make no further comment thereon.

Referring to the cases of *International Shoe* and *McGee* the Court in the *Hanson* case once again considered the *activity* of the foreign corporation in the forum state. Concluding that there was no sufficient minimal contact with the forum state, the Court said (357 U. S. at p. 251):

> "The cause of action in this case is not one that arises out of an *act done* or *transaction consummated* in the forum State." (Emphasis ours.)

The principle that the cause of action must arise out of the activity within the forum was considered by the Court in the cases of *International Shoe*, *McGee*, and *Hanson*. The petitioners concede that their third party complaint does not state a cause of action arising out of their formal contract with the respondent (Petition, p. 15) but claim that it "arises from a contractual relationship based upon that contract, absence of which none of the parties to this action would be in the New Jersey State Court today".

The petitioners seem to be suggesting the application of a "but for" rule which we submit is logically unsound. The petitioners again play on words when they state (Petition, p. 23) that "(t)he facts of the case *sub judice* involve the commission of a tort arising out of the performance of the contract by the foreign corporation". As was stated by the court below (Appendix C of Petition, p. 5a):

> "As against Stanker [*sic*] the third party complaint alleges in substance that (to quote the affidavit of Stanker's counsel): '* * * it was Earth Movers, Inc., in fulfillment of their contract to place fill in the area surrounding the erection on the premises, who would or should be chargeable with the negligence claimed by plaintiff to have caused the accident and Earth Movers, Inc. would accordingly be liable by way of indemnification or at least as a joint tortfeasor' " (Respondent's Appendix Below, p. 3a).

Negligence is not dependent upon a contract or its terms. One under contract to do certain work may be shown to be negligent although he has complied with the terms and specifications of the contract. Conversely, one may have technically breached a contract and yet in doing so may have acted in a reasonable manner so as not to have been negligent as to a third person. The petitioners and respondent could have been strangers, parties to no contract. To say that *but for* the contractual relationship the respondent would not have been in a position to have committed a negligent act or omission is highly illogical.

The petitioners contend that the respondent failed to prove that it would be prejudiced or inconvenienced by being subjected to the jurisdiction of the New Jersey Courts (Petition, p. 18), that there is no logical and legal reason why the respondent cannot as effectively be represented in New Jersey as in Delaware (Petition, p. 22), and that it is more desirable and practical to have all the parties

together in an action and thus avoid a multiplicity of suits (Petition, p. 22) with long delays and a possible denial of justice to the petitioners (Petition, p. 24).

As stated by the Court below citing *Hanson v. Denckla*, 357 U. S. 235,

> ". . . the fact that Webb's action makes our courts the most convenient ones for the disposition of all of the issues in the litigation and that it would not be inconvenient for Earth Movers to appear here may not be accepted as a substitute for the constitutional necessity of 'minimal contacts with that State that are a prerequisite to its exercise of power over' it." (Appendix C of Petition, p. 11a.)

Justice will not be denied the petitioners in any event. Should the plaintiff fail to recover a judgment against them, there will be no necessity for any further action, and should the plaintiff recover, the petitioners' cause of action can then be asserted against the respondent in the State of Delaware.

II.

The Judgment Below Is Not Final

The petitioners here originally petitioned the New Jersey Superior Court, Appellate Division, for leave to appeal from the *interlocutory* order of the trial court. The third-party complaint of the petitioners (Petitioner's Appendix Below, p. 19a) had alleged that the respondent would be liable to them for contribution as a joint tortfeasor or for indemnification for any judgment obtained by the plaintiff against the petitioners. The proof of such allegations would necessarily depend upon a showing that the respondent was negligent, that such negligence, either solely or in conjunc-

tion with the petitioners' negligence caused injury to the plaintiff, and that the plaintiff is entitled to judgment against the petitioners. Since this action has not yet come to trial, the order of the trial court dismissing service of process on the respondent is purely interlocutory and adjudicates none of the substantive rights or liabilities of the parties. Should the plaintiff recover no judgment against the petitioner, the petitioner would have no further cause of action against the respondent. The order dismissing service of process on the respondent being interlocutory, it is urged that such order is not a proper subject of review by this Court and that the lack of finality furnishes sufficient ground for denial of the petition. *Hamilton-Brown Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258.

III.

There Is No Important Question of Federal Law

The third party complaint alleges a cause of action against the respondent for an alleged tortious act or omission which occurred, if at all, in the State of Delaware and was completely unrelated to and independent of any act of the respondent in the State of New Jersey. The petitioners suggest that "the questions presented are of far reaching importance to all states and are of great and recurring significance in the administration of justice in State Courts" (Petition, p. 22). Their brief, however, contains no citation to pending litigation or indication that such facts as those presented have ever arisen in an appellate court. The novelty of this case is the result of clear pronouncement by this Court.

The petitioners now ask this Court to make a pronouncement as to whether the ruling in *McGee v. International Life Ins. Co.*, is to be limited to contracts of insurance

(Petition, p. 22). We submit that the question has already been answered. If the Court in *McGee* did not intend to limit its ruling only to cases involving actions on insurance contracts, it is our belief that it did intend to limit it to cases where the State had enacted special legislation "to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation." *Hanson v. Denckla,* supra. The instant case presents no such situation.

The petitioners ask this Court to declare whether the rulings in *International Shoe* and *McGee* shall apply only where the cause of action arises out of the activity of the foreign corporation in the forum state. We submit that the question has already been answered in the affirmative. *International Shoe Co. v. Washington,* supra, *McGee v. International Life Ins. Co.,* supra, *Hanson v. Denckla,* supra.

Contrary to the petitioners' assertions, there appears no "vexing question", no "controversy in other jurisdictions", and no "misinterpretation and misapplication of this Court's standards" (Petition, p. 22). A correct decision based upon a simple fact situation should not be made to appear an important question of Federal Law of great and widespread concern.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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